

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE: FCA US LLC MONOSTABLE
ELECTRONIC GEARSHIFT LITIGATION

Case Number 16-md-02744
Honorable David M. Lawson

MDL No. 2744

MOTIONS TO EXCLUDE
STATUS CONFERENCE

BEFORE THE HONORABLE DAVID M. LAWSON

United States District Judge
Theodore Levin United States Courthouse
231 West Lafayette Boulevard
Detroit, Michigan
April 25, 2019

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1 Detroit, Michigan

2 April 25, 2019

3 2:06 p.m.

4 * * *

5 THE CLERK: All rise. The United States District
6 Court for the Eastern District of Michigan is now in session,
7 the Honorable David M. Lawson presiding.

8 THE COURT: You may be seated.

9 THE CLERK: Now calling the case of In Re: FCA US LLC
10 Monostable Electronic Gearshift Litigation, Case Number
11 16-2744.

12 THE COURT: Good afternoon, counsel. May I have your
13 appearances for the record, please?

14 MR. MILLER: Good afternoon, your Honor. Powell
15 Miller for plaintiffs.

16 MR. PITOUN: Good afternoon, your Honor. Christopher
17 Pitoun, also for plaintiffs.

18 MR. EDWARDS: And Adam Edwards, Greg Coleman Law, for
19 the plaintiffs.

20 THE COURT: I'm sorry, counsel, again?

21 MR. EDWARDS: Adam Edwards.

22 THE COURT: Oh, there it is. Thank you.

23 MR. FRESARD: Thank you, your Honor. Fred Fresard
24 and Jim Feeney for FCA. And Mr. Williams is here for the
25 product liability plaintiffs status conference.

1 THE COURT: Oh, all right. Let's deal with the
2 motions first. I have got the plaintiffs' motion to exclude
3 the testimony of Bruce -- is it Strombom? Is that how it's
4 pronounced?

5 MR. EDWARDS: Correct.

6 THE COURT: Then the defendant's motions to exclude
7 the testimony of Justine Hastings and Craig Rosenberg.

8 Who is arguing what?

9 MR. EDWARDS: I'm arguing for the plaintiffs, your
10 Honor.

11 THE COURT: On all the motions?

12 MR. EDWARDS: On the motion to exclude Strombom.

13 THE COURT: Okay.

14 MR. PITOUN: And I'm arguing for plaintiffs --

15 THE COURT: For the other two?

16 MR. PITOUN: The other two, your Honor.

17 MR. FRESARD: I'll be handling all three for the
18 defendant, your Honor.

19 THE COURT: All right. And Mr. Feeney is carrying
20 your briefcase today?

21 MR. FRESARD: He is.

22 MR. FEENEY: Yes, sir. It's a heavy load.

23 THE COURT: They were filed in order, so let's take
24 the plaintiffs' motion first. And is that Mr. Pitoun that's
25 arguing for the plaintiff on the motion to exclude

1 Mr. Strombom?

2 MR. EDWARDS: That's me, Adam Edwards, your Honor.

3 THE COURT: Oh, Mr. Edwards. Pardon me. I'll get it
4 straight.

5 MR. EDWARDS: That's fine.

6 THE COURT: Mr. Strombom's -- Dr. Strombom's opinion
7 is twofold, as I understand it. One has to do with his
8 criticisms of Dr. Hastings' approach, and the other has to do
9 with his own view, I guess, with respect to damages. And so I
10 understand that you are basically attacking both of those.

11 MR. EDWARDS: That is correct, your Honor.

12 May I approach the podium?

13 THE COURT: You can argue from there or from the
14 lectern here, if you wish, wherever you're more comfortable.

15 MR. EDWARDS: I would prefer to come forward.

16 THE COURT: That's fine. That's fine.

17 MR. EDWARDS: Your Honor, that is correct.

18 There's essentially two pieces to this. The first
19 piece is whether Dr. Strombom is sufficiently qualified, has
20 sufficient expertise to be able to make technical criticisms
21 of the conjoint analysis-based damages model that our expert,
22 Ms. Hastings, put together, and I'll talk about that briefly.

23 And then perhaps the larger issue here is whether the
24 Strombom analysis of used vehicle depreciation is a reliable
25 method for determining whether class members were damaged at

1 the original point of sale. And I would be glad to take those
2 in turn.

3 Dr. Strombom admits and stated specifically in his
4 deposition that he does not consider himself to be an expert
5 in conjoint analysis. Dr. Strombom admitted also that he has
6 never designed a conjoint analysis survey. And third, he
7 admitted that he has never fielded a conjoint analysis survey.

8 Now, I understand FCA argues that Dr. Strombom does
9 not, in fact, attack the validity of the conjoint analysis
10 survey or the way in which Dr. Hastings proposed -- proposes
11 to conduct her conjoint analysis, but rather attacks the false
12 assumptions underpinning that survey; in other words, the
13 economic underpinnings. That's what --

14 THE COURT: Well, there is no survey; right? Yet?

15 MR. EDWARDS: There is a -- there is a survey
16 designed and included, and the survey will be forthcoming,
17 absolutely.

18 So the problem with that statement from FCA, that
19 Dr. Strombom does not, in fact, attack the technical aspect of
20 the proposed conjoint survey, is Dr. Strombom's own testimony.

21 I asked him at his deposition very specifically --

22 THE COURT: I'm familiar.

23 MR. EDWARDS: Okay. Yeah. I asked him, your Honor,
24 if he had technical criticisms --

25 THE COURT: Your argument essentially is that he

1 disqualified himself; right?

2 MR. EDWARDS: Right. He has asserted various
3 technical criticisms, such as bias within the survey, such
4 as attacking the way that she -- that Dr. Hastings would do
5 pricing. Those are technical criticisms of a conjoint
6 analysis survey.

7 A survey expert would know that things like bias can
8 be addressed by a survey expert through pretesting the survey,
9 avoiding focalism bias through the wording used, very
10 technical, kind of in-the-weeds things that conjoint survey
11 experts know.

12 Dr. Strombom says, "Well, I don't think she did it
13 right," but he doesn't really have the expertise to get into
14 those -- those weeds, your Honor.

15 He also attacks her survey design regarding the
16 selection of pricing. He states that Dr. Hastings fails to
17 consider the vehicle pricing is negotiated and that identical
18 vehicles sell for different prices, for example. That's
19 another one of the technical criticisms.

20 When I asked --

21 THE COURT: I'm trying to sort of look at this in the
22 big picture.

23 MR. EDWARDS: Sure.

24 THE COURT: The opinions that are being discussed
25 here in these motions; attacked, if you will, are all related

1 to the question of class certification, which is a decision
2 by me, not by a jury.

3 And to the extent that Dr. Strombom criticizes
4 Dr. Hastings, I understand that some of those criticisms will
5 be fodder for the motion to exclude Dr. Hastings' opinion
6 because of her methodology, but beyond that, what difference
7 does it make whether he is qualified to level those criticisms
8 or not if I conclude that his criticisms really don't amount
9 to much because he said he doesn't have the experience?

10 What's the import of the motion and why did you have
11 to file it?

12 MR. EDWARDS: Yeah, I think I would agree with you,
13 your Honor, if solely for the purpose of class certification.
14 If you -- if you don't believe that he has the sufficient
15 expertise to launch any valid criticisms of the conjoint
16 survey at issue, then I would agree with you. I would,
17 though, have an issue with Dr. Strombom, if we get this far
18 down the road, talking to the jury about various issues
19 related to the conjoint survey design, because he doesn't
20 have the expertise to do that.

21 THE COURT: Well, we're a few hundred yards away from
22 that, I think.

23 MR. EDWARDS: That we are. That we are, your Honor.
24 What Dr. Strombom is very familiar with, your Honor,
25 is analyzing used car depreciation rates, and that's really

1 the other major component of our motion to exclude. This
2 process involves using -- analyzing used car data, and that
3 usually comes from auction houses or other public sources,
4 looking at that data and determine if the depreciation rate is
5 off kilter with what we would expect it to be in the market,
6 comparing it to other vehicles.

7 The term that he used and that I think is appropriate
8 here is trying to determine if there was excess depreciation
9 of used cars. The problem with this method is that plaintiffs
10 allege that FCA vehicles were sold with a diminished value at
11 the point of sale due to an undisclosed latent defect. The
12 amount in which the class members -- the proposed class
13 members overpaid is exactly what the conjoint analysis survey
14 is designed to measure. It's not what the analysis of used
15 vehicles years later is designed to measure.

16 I asked Dr. Strombom specifically in his deposition:

17 "Was part of your assignment in this case to attempt
18 to calculate classwide damages at the initial point of
19 purchase?"

20 His answer: "No, I don't -- I don't believe so."

21 The question then becomes, if Dr. Strombom is
22 admitting that he is not calculating damages at the point of
23 sale consistent with plaintiffs' theory of liability and
24 damages in this case, then can any numbers from years later
25 in the used car market be extrapolated to give us meaningful,

1 useful, reliable information about whether there was, in fact,
2 overpayment at the point of sale? Because that's the real
3 issue.

4 So I asked him, can you point to -- and we cite this
5 in our brief and I know your Honor has read it, but to
6 paraphrase, we asked him, is there any academic literature out
7 there, is there anything that's peer reviewed or generally
8 accepted which would close that gap? Because what we now
9 have is a chasm between over here, has there been excess
10 depreciation, and over here, did someone overpay for a
11 defective product at the point of sale. He said none that he
12 knows of. He doesn't know that that's ever been addressed.
13 That was his response.

14 So the follow-up is, okay, well, if there is not any
15 literature about it, perhaps you have done it. Perhaps you
16 have gone through this process yourself of trying to cross
17 this chasm in tying these two things together.

18 So I asked him specifically: "Is looking at used car
19 prices a way that you would utilize to assess damages at the
20 original point of sale for an auto defect case?"

21 Answer: "You know, I don't think I have ever
22 actually found a diminution in value associated with a defect
23 in used car prices."

24 So he has never had to do that. Because he has never
25 found diminution in the market, he has never had to transpose

1 that to make the determination as to whether that has any
2 effect on overpayment at the point of sale.

3 So what we're left with is some numbers about
4 depreciation in the used car market which FCA, according to
5 Dr. Strombom's testimony, will attempt to use to create some
6 implication about whether there has been damage at the point
7 of sale. But really, there is no bridge between those two
8 things, your Honor. It doesn't tell us a single thing about
9 whether a person that purchases a car with a latent safety
10 defect overpaid due to the failure to disclose that defect.

11 THE COURT: In the consolidated complaint, the second
12 amended consolidated master complaint, the plaintiffs have
13 alleged that the vehicles have substantially diminished value
14 and that the value -- and that the diminution is increasing --
15 I'm sorry -- they are diminishing in value at an increasing
16 rate month by month. And then at paragraphs -- paragraph 24,
17 the allegation is, and I'm quoting, "As a specific example of
18 the increased diminution in value, 2014 and 2015 Jeep Grand
19 Cherokees held their value better than other cars in their
20 class before knowledge of the shifter defect became
21 widespread, but after the defect became known, the monthly
22 depreciation in these cars increased dramatically, causing
23 them to hold value worse than other cars in their class."

24 So I understand that you seek to measure damages or
25 establish a deficit at the point of sale, but you also are

1 alleging in the complaint depreciation at an excess -- at
2 excess values. So wouldn't Dr. Strombom's analysis be
3 pertinent to that?

4 MR. EDWARDS: Two things, your Honor. Very good
5 points.

6 First of all, from the plaintiffs' position, we're no
7 longer pursuing that as a form of damages. At this point the
8 only damages the plaintiffs are pursuing are damages at the
9 point of sale. That damages claim has been abandoned.

10 Second, Dr. Strombom --

11 THE COURT: Is there something formal in the
12 pleadings that suggests that?

13 MR. EDWARDS: I'm sorry?

14 THE COURT: Let me say it again. Is there something
15 formal in the pleadings that suggests that position?

16 MR. EDWARDS: Not that I know of, your Honor.

17 THE COURT: So that's news to me. Is it news to the
18 defendants?

19 MR. EDWARDS: I'm not sure if it's news to the
20 defendants. They are shaking their head yes.

21 But I can represent on behalf of the plaintiffs that
22 all of the damages sought in this case are damages at the
23 point of sale.

24 The second major point, though, your Honor, is it
25 was very clear from his deposition, that's not -- his damages

1 model looking at used car depreciation is not just in rebuttal
2 to that assertion that was in the second amended complaint or
3 the earlier drafts of the complaint. He wants to use -- FCA
4 wants to use the used car depreciation numbers that Strombom
5 found as evidence that there wasn't an overpayment or
6 diminished value at the point of sale, and that's the chasm
7 that they simply can't cross.

8 THE COURT: And you're saying there is nothing out
9 there anywhere that supports some interpolation of one to the
10 other; is that what you're saying?

11 MR. EDWARDS: That's exactly right, your Honor.
12 People can overpay for a defective and unsafe car at the
13 point of sale, and if years later that vehicle still sells
14 consistent with the used car market, that could be due to a
15 number of things. I mean, FCA still denies that these
16 vehicles are defective, so there has been no admission from
17 FCA. That could be a reason why the market is not responding
18 in terms of depreciation. There are many others.

19 But the real issue here is, there is absolutely
20 nothing that Dr. Strombom can point to or nothing in any sort
21 of generally-accepted literature which would indicate that we
22 can look at excess depreciation years later in the used car
23 market and that can weigh in any way on the point of sale
24 damages which are being alleged in this case and were
25 consistent with plaintiffs' theory of liability.

1 And, your Honor, if you -- unless you have any
2 further questions, that's all we have.

3 THE COURT: No, I don't.

4 MR. EDWARDS: For these reasons we feel like the
5 opinions of Dr. Strombom will be of no aid to this Court and
6 certainly not to the jury.

7 THE COURT: Thank you, Mr. Edwards.

8 Mr. Fresard?

9 MR. FRESARD: Thank you, your Honor.

10 Your Honor, the plaintiffs, I think in their
11 pleadings regarding the conjoint analysis issue, they have
12 sort of created a straw man out of Dr. Strombom, saying he is
13 here to refute Hastings' conjoint analysis and then spent half
14 their brief trying to knock him down, completely ignoring the
15 fact that we have a conjoint analysis expert.

16 THE COURT: Right.

17 MR. FRESARD: Rene Befurt.

18 Dr. Strombom's role, from our perspective, is more
19 attacking the underlying economic assumptions that
20 Dr. Hastings made when she proposed a potential conjoint
21 analysis that she has not yet designed or conducted. What
22 he -- what Dr. Strombom --

23 THE COURT: Well, she has -- I understand that she
24 has proposed and assembled a methodology, but she hasn't put
25 any flesh on the bones by devising a survey or going into the

1 field. Am I incorrect or --

2 MR. FRESARD: The survey has not even been designed.
3 It has to be designed with the choices that are going to be
4 presented, who the participants are going to be, what they are
5 going to be asked, and none of that has been done.

6 And we can talk about that more in the context of the
7 Hastings motion, but that's what we think differentiates her
8 from other conjoint analysis experts who have been allowed to
9 testify, is they have actually said, "Here's the survey I'm
10 going to do. Here are the questions I'm going to ask. Here
11 are the options I'm going to give." She has done none of
12 that.

13 THE COURT: Well, we'll talk about that in a moment,
14 as you say, but what about Dr. Strombom?

15 MR. FRESARD: So one of Dr. Strombom's major
16 criticisms of Dr. Hastings is that she says when she does her
17 work, eventually she is going to find the actual transaction
18 data, new car transaction data, and use that data to see what
19 the price was at that point.

20 Mr. Feeney and I were talking about that in
21 preparation for this. We have both been doing automotive
22 consumer class action work for a long time, and new car sales
23 transaction data is the unattainable holy grail for economics
24 experts. There is none. The dealers won't share it. The
25 OEMs won't share it. The only data available out there is the

1 NADA Blue Book.

2 THE COURT: Can't you get them from Secretaries of
3 State?

4 MR. FRESARD: Not the actual transaction data as to
5 the sales price.

6 THE COURT: Isn't that on the RD108s?

7 MR. FRESARD: We have never been able to obtain the
8 actual sales, the --

9 THE COURT: Price, the sales price?

10 MR. FRESARD: New car sales price data, no economics
11 expert has ever been able to get it.

12 THE COURT: You mean in the aggregate?

13 MR. FRESARD: Pardon me?

14 THE COURT: You can find it transaction by
15 transaction, though, can't you?

16 MR. FRESARD: If you do individual inquiries, I
17 suppose, but there is no -- R.L. Polk doesn't. We've never
18 been able to obtain the new car sales price data.

19 THE COURT: Oh, all right.

20 MR. FRESARD: So Dr. Strombom has typically purchased
21 the NADA data, the Blue Book data, and that's what most
22 economics experts have done in the automotive field, both on
23 the plaintiff side and the defense side. And what that allows
24 them to do -- and this is the analysis that Dr. Strombom did
25 in this case and that he has done in several other cases. We

1 had him on the stand last January in an automotive consumer
2 class action out in California where he was qualified and
3 testified as to this depreciation analysis.

4 THE COURT: Which case was that?

5 MR. FRESARD: That was Daniel versus Ford Motor
6 Company.

7 THE COURT: Was that the My Ford Touch?

8 MR. FRESARD: No, no. It was a rear tire wear --
9 premature rear tire wear class action claim.

10 Dr. Strombom's position is that Hastings says she
11 can compute common classwide damages as to what each of the
12 plaintiffs had on a common classwide basis. What he is
13 saying is, if that was true that she could do that and the
14 plaintiffs are claiming a material omission, they are claiming
15 that FCA hid some information from the purchasers or did not
16 disclose the defective nature of this shifter at the time of
17 sale. They also plead in their complaint that the information
18 ultimately became known to the class. They plead that
19 repeatedly in their complaint. And there was a recall. And
20 Dr. Strombom cites to a whole lot of critical articles about
21 the shifter.

22 There is no doubt that at some point the market
23 became knowledgeable about this alleged omission. If the
24 plaintiffs' claim is true that the plaintiffs all paid too
25 much for their vehicles, and all about the same percentage too

1 much, because that's what Hastings will have to say to get to
2 certification, then the Grand Cherokee and the Challenger and
3 the Chrysler 300 should have all depreciated at the same rate
4 as their competitor vehicles. Excuse me, they all depreciate
5 at the same rate.

6 What should have happened when that knowledge came
7 out, they should have suddenly -- you should see the chart go
8 down and they should suddenly be depreciating at a much faster
9 rate than their competitor vehicles, because now there is a
10 known defect. Everybody is saying, "You paid too much for
11 that Grand Cherokee. When I buy it off of you, I'm not going
12 to pay the premium that you paid for it." And that's --
13 that's how the analysis is done.

14 And in fact, we did find where Christine Hastings
15 herself did a depreciation analysis in the iPhone case, in
16 the Grace versus Apple case in the Northern District of
17 California. It's really the only data that's available to go
18 back and look and say, okay, assuming the consumer didn't know
19 this and then assuming the consumer became knowledgeable about
20 this, we should see a dropoff in our product compared to other
21 products, and we don't see that here.

22 And that's really the gist of Dr. Strombom's
23 depreciation analysis, is he's using it as proof that you
24 cannot prove common classwide damages at the point of sale.

25 As far as his criticisms of Dr. Hastings --

1 THE COURT: Well, I was with you for a while until
2 you said that last sentence, and that essentially is attaching
3 a depreciation analysis to a question about whether the
4 consumer paid too much when the consumer bought the vehicle to
5 begin with. So how do you relate depreciation to point of
6 sale questions?

7 MR. FRESARD: Because the plaintiffs are alleging in
8 this case that there was a material fact omitted at the time
9 of sale.

10 THE COURT: Right.

11 MR. FRESARD: And then the market became aware of
12 that fact after the sale. And had FCA told the class members
13 about that fact at the point of sale, the class members would
14 have insisted on a discount and the cars would have been sold
15 for a cheaper amount.

16 THE COURT: You mean -- oh, you mean at the time when
17 they were purchased new?

18 MR. FRESARD: Right. And so if that is true, then
19 when the market became aware of this alleged defect, the price
20 of the Cherokee compared to its competitors should plummet to
21 reflect that decrease in value, that the vehicles are worth
22 less because they have this defect.

23 THE COURT: Which is what was alleged in the
24 complaint in that paragraph that I read earlier.

25 MR. FRESARD: Yes, as far as not only alleged damages

1 for increased depreciation, but they also do allege that the
2 customers didn't get their benefit of the bargain, overpaid.
3 The evidence of that would be is if the market, because the
4 market reflects reality, the market would say all these cars
5 are defective. They are not worth as much as the Explorer
6 or --

7 THE COURT: Well, the conjoint analysis, or any other
8 multi-attribute compositional modeling, would also answer that
9 question; right?

10 MR. FRESARD: If it is done properly. If it's
11 modeled properly it could potentially answer that question, I
12 think, but you've got to have the new car transaction data,
13 according to Dr. Hastings in her report and at her deposition,
14 to do that. And we -- I would like to hear where they plan to
15 get that data from.

16 THE COURT: Okay.

17 MR. FRESARD: I don't think you can obtain it. But
18 that's essentially Dr. Strombom's role, your Honor, is as an
19 economist, not as a conjoint analysis expert, to look at the
20 underpinnings of Dr. Hastings' opinions from on the economic
21 side, not on the conjoint analysis side. And he has some
22 criticisms of her in that regard, and particularly with regard
23 to her claim that she can establish common classwide damages.

24 THE COURT: Did you want -- I guess you basically
25 addressed both aspects of the argument, criticism of

1 Dr. Hastings and also his own analysis with respect to
2 depreciation. Did you want to say anything about separating
3 those things or are you content with your argument?

4 MR. FRESARD: I would separate them only in the
5 context that to the extent the plaintiffs are attacking
6 Dr. Strombom's qualifications, to discuss how a conjoint
7 analysis is performed, he's offered for that purpose. That's
8 Dr. Befurt.

9 THE COURT: Yeah. Okay. Thank you.

10 THE COURT: Mr. Edwards, any follow-up?

11 MR. EDWARDS: Very briefly, your Honor.

12 When attorneys usually say "very briefly" you've got
13 to watch out, but I actually intend to do it.

14 THE COURT: I'm very steeled against that phrase
15 these days.

16 MR. EDWARDS: I'm going to address the pricing data
17 and I'm going to briefly address this theory about how used
18 car depreciation data can be converted to some -- something
19 useful about overpayment at the point of sale.

20 First of all, with pricing data, your Honor, I also
21 do a lot of auto defect cases and work with a lot of conjoint
22 experts and actual, real-world transaction data at the point
23 of sale; in other words, finding out what people -- it is
24 difficult to find. I don't know if I would agree with
25 impossible, but it is, it is very difficult to find, and

1 sometimes with more -- with some car manufacturers, more
2 difficult than others.

3 The thing about conjoint analysis that makes it
4 special and very useful in this context is, when information
5 like price, actual prices paid in the market is not readily
6 available, it's very easy and very scientifically valid to use
7 a conservative proxy for actual prices paid. And keep in mind
8 here, your Honor, that a good conjoint survey is probably --

9 THE COURT: Where does that come from?

10 MR. EDWARDS: In this case, your Honor?

11 THE COURT: Well, generally first.

12 MR. EDWARDS: Sure. It can -- one could use MSRP as
13 a proxy for actual prices paid. And the more conservative
14 approach and what is -- what is also, I think --

15 THE COURT: MSRP would not be a conservative
16 approach, would it?

17 MR. EDWARDS: Well, keep in mind, your Honor, that
18 when you're designing a conjoint, the price levels don't need
19 to be actual prices paid, but rather, the price level on the
20 low end. You'll have different attributes or levels within
21 the middle of that price range and then you will have a top.
22 The key thing, what makes a conjoint great is, as long as you
23 have the prices paid within that range, you're going to get a
24 valid and reliable scientific result.

25 THE COURT: Well, I understand what you're comparing

1 is relative value to the consumer on a part-by-part basis, and
2 that's the whole point of a conjoint analysis; right?

3 MR. EDWARDS: Right.

4 THE COURT: Okay. And what you would end up is --
5 what you would end up with is a value based upon a percentage,
6 would you not, of the diminution in value at the point of sale
7 based upon the defect you're trying to focus on?

8 MR. EDWARDS: Correct, your Honor. You're going to
9 isolate out the defect at issue, and a conjoint analysis
10 expert is going to be able to extrapolate from that data
11 through something called hierarchical base regression, in some
12 cases is going to -- is going to be able to pull out those
13 numbers and make a determination as to what the reduction in
14 willingness to pay is. Or in a case like this where the
15 supply side is fixed as a matter of history, translate that
16 to reduction in market value. So, yes, it calculates the
17 overpayment.

18 THE COURT: And what you're looking for, though, is a
19 price per car or an amount per car that was overpaid; right?

20 MR. EDWARDS: It can be expressed in a lot of
21 different ways, but typically it's expressed in a percentage
22 reduction in value based on the defect.

23 THE COURT: Okay. Go back to that, then. If it's
24 a percentage reduction in value and you're starting with MSRP,
25 which generally is inflated in terms of actual transactions

1 with a few rare exceptions, don't you end up with a skewed
2 result?

3 MR. EDWARDS: I gave MSRP as one example that I have
4 seen in the conjoint. I think we have gotten a little far
5 afield now, because in this case Dr. Hastings actually used
6 invoice price, which is conservative.

7 THE COURT: Oh.

8 MR. EDWARDS: And very few people are going to pay
9 less than invoice price. So Dr. Hastings chose the more
10 conservative route and used invoice as a proxy for the actual
11 prices paid. So we're erring on the side of being
12 conservative there.

13 THE COURT: Okay.

14 MR. EDWARDS: With regard to FCA's position that,
15 look, we can tell -- if the market becomes aware of the
16 alleged defect years later, we should see this drop in resale
17 values and that is somehow indicative that there -- if we
18 don't see this excess depreciation drop, this would be
19 evidence that, in fact, there is no overpayment at the point
20 of sale.

21 Conjoint analysis is very good at looking at, okay,
22 how would the market have reacted if FCA would have disclosed
23 this defect at the point of sale? Looking at depreciation
24 rates like this can never make an equivalent simulation
25 because sitting here today FCA still denies that there is a

1 defect. Conjoint analysis forces awareness, just like the
2 awareness would be forced if FCA made the admission that there
3 was a defect at the point of sale, and that's what really
4 matters.

5 Looking at prices paid years later based on, well,
6 I saw this on Good Morning America, or there was some media
7 coverage about this because a star died, that's not the same,
8 your Honor, as FCA coming out and saying, "Here's the
9 problem."

10 Let's not also forget that there was a --

11 THE COURT: Well, what about the recall?

12 MR. EDWARDS: You were -- you beat me there. Let's
13 also not forget that there was an FCA recall in this case.

14 THE COURT: Isn't that an admission, essentially,
15 that there's a problem?

16 MR. EDWARDS: Well, the FCA -- the FCA recall
17 addressed one component. And the implication of that recall,
18 if I'm a used car salesman -- well, not me personally, but
19 I can certainly see a used car salesman indicating to a
20 consumer, if the consumer doesn't believe already that the
21 recall addressed this safety defect, which as you know we
22 allege it did not, so it's really no surprise the market isn't
23 reacting in these depreciation rates because FCA is, first of
24 all, denying this ever was a safety defect, and B, they have a
25 recall to fall back on to say, yeah, this has all been taken

1 care of, it's nothing for you to worry about.

2 In the end it still doesn't tie to an actual
3 overpayment number at the point of sale the way it would if
4 Chrysler would have come out and said, yes, this is the safety
5 defect at issue. That's what conjoint is excellent at doing.

6 That's all I have.

7 THE COURT: Thank you.

8 All right. I'll take that motion under advisement.
9 I'll get you a written decision in due course.

10 And Mr. Fresard, let's deal with Dr. Hastings,
11 please.

12 MR. FRESARD: Seems topical.

13 THE COURT: I guess.

14 MR. FRESARD: Your Honor, I think to follow up on
15 some of the comments by counsel, we have learned today just
16 now that Dr. Hastings plans to use dealer invoice data as
17 part of her analysis and I don't know whether that data is
18 compiled. Dealers have different invoice prices based on who
19 the dealer is. A mega dealer in three states gets a better
20 deal from FCA than the little dealer up north. Dealer
21 invoices include overhead, heat, lighting, other -- their
22 advertising costs. I don't know where there is a compilation
23 of dealer invoice data. I don't -- I have just never heard of
24 it before.

25 And that sort of gets to the point of Dr. Hastings'

1 limitations in this case. You know, when we took her
2 deposition we were kind of surprised at her absolute lack of
3 knowledge of the auto industry and not knowing what terms like
4 OEM meant.

5 When she was asked about, what is a dealer incentive
6 program, she said it's a program that incentivizes dealers.
7 We all live in an automotive town and --

8 THE COURT: Well, isn't that true?

9 MR. FRESARD: It is. Might be a little more
10 complicated than that, though.

11 Just living in an automotive town we sort of know how
12 sophisticated the whole sales transaction process is. And
13 according to Dr. Hastings, buying a car is simpler than buying
14 a tube of toothpaste is what she said. Toothpaste is much
15 more complicated because there's so many of them.

16 And that's one of our underlying problems. When she
17 is saying, I'm going to go out and I'm going to design a
18 survey to test how much people overpaid for the class vehicles
19 because they did not know of the defect, she is unable to
20 bring to bear any knowledge of the auto industry, things
21 like negotiation or things like whether the dealer's at an
22 end-of-the month quota, whether it's winter or summer, all of
23 these factors that she is not even aware of, and she hasn't
24 proposed how she is going to deal with them in her survey.

25 Most importantly, she said at her deposition she

1 doesn't know how she is going to deal with the recall, and
2 that's a huge issue. In the typical consumer case we have got
3 a claim of a material omission by way of a safety-related
4 defect, and then some dispute about whether there is, in fact,
5 a defect that affected the value of the vehicles.

6 In this case, there was a recall. There was an
7 admission that the vehicles needed some additional mitigating
8 technology to protect drivers if they made a shifting error
9 when they got out of their car and unbuckled their seat belt
10 to put the car in park.

11 THE COURT: I thought Mr. Edwards deftly turned on
12 that one, saying it's sort of a two-edged sword because the
13 recall is an acknowledgment there is a problem, but also a
14 claim that it's not a problem anymore. How do you respond to
15 that?

16 MR. FRESARD: Well, because it is -- the recall did
17 resolve the problem. The pleading, I think paragraph 152 of
18 their second amended complaint, is that the shifter is
19 confusing, error prone, and if only -- if only --

20 THE COURT: Take a minute, if you want.

21 MR. FRESARD: Paragraph 152 of their complaint:
22 "Safety override features are common in other car companies'
23 vehicles that use a monostable shifter. And if FCA had
24 employed a safety override it may have prevented the
25 collisions, injuries and death associated with the defective

1 shifter. For example, Mercedes sells vehicles with monostable
2 shifters like those in the class vehicles, but Mercedes
3 vehicles include a safety feature that automatically shifts
4 the gear to park when the engine is running and the driver
5 releases his foot off the brake pedal and the driver's side
6 door is open. This safety override eliminates the potential
7 for the dangerous vehicle rollaways associated with the
8 defective shifter."

9 So they pled in the complaint that they filed that
10 the defect is a risk of rollaway when the driver gets out, and
11 had customers known about this they would have paid less for
12 it. Then subsequently there was a recall that imposes the
13 exact remedy that they pled in 152 FCA should have
14 implemented.

15 And Hastings said she doesn't know how she is going
16 to deal with that. She said, "I don't know how I'm going to
17 deal with the recall." That was her testimony. And we still
18 haven't seen how she is going to deal with it.

19 And that's in addition to her sort of lack of
20 knowledge in the auto industry. It's her lack of any proposed
21 design. She hasn't designed a survey. She hasn't told us who
22 she is going to survey. She hasn't decided whether it's going
23 to be class members or -- or people not in the class, because
24 she said class members already know about the monostable
25 shifter. So she doesn't know that.

1 She said she -- at her deposition she was not going
2 to include people who buy used cars. 25 percent of the class
3 members purchased these vehicles used. So her opinions are
4 not relevant to that 25 percent of the class, and they are not
5 a fit under Daubert as to those 25 percent of the class.

6 Your Honor, we attached a lot of conjoint analyses
7 done by other experts and other decisions. And plaintiff, in
8 their supplemental briefing, cited to the Scheckner decision,
9 Judge Murphy's decision. In all of those cases the Court was
10 looking at a conjoint analysis that was designed, and in the
11 vast majority of those cases, conducted, but at least a
12 designed study that said, "I'm going to ask these questions
13 and I'm going to survey this population. I'm going to control
14 for the variables this way." None of that has been done in
15 this case.

16 And I don't know why, but the plaintiffs have chosen
17 to, I think, roll the dice a little bit and say -- she says,
18 "I'm going to design a survey. I will get there at some
19 point." The problem is that for your Honor to assess their
20 motion for class certification, your Honor needs to know if
21 they are going to be able to prove common classwide damages,
22 and Dr. Hastings just doesn't even give your Honor a survey
23 that the Court could look at and decide whether it's reliable
24 or a fit under Daubert. We don't even come close to getting
25 there.

1 And because of that, your Honor, we don't think the
2 plaintiffs are going to be able to prove classwide damages and
3 we don't think the Court ought to let Dr. Hastings' report
4 stand. It doesn't even assist the Court, really, I think, in
5 calculating classwide damages. And for all those reasons, we
6 would ask that the Court exclude Dr. Hastings in this case.
7 She just hasn't done the work.

8 THE COURT: Okay. Thank you.

9 Mr. Pitoun, I think this is yours; right?

10 MR. PITOUN: Yes, your Honor.

11 A couple points I want to respond to from
12 Mr. Fresard's comments. One, with regards to the source of
13 the dealer invoice data, the source on that was FCA itself.
14 They gave it to us. So we're going off data they have
15 provided to us in discovery. And if that's wrong, I sort of
16 don't know what to do about that. But they provided to us
17 dealer invoice data and MSRP data for each of the class
18 vehicles, so that's what we're going to be using and that's
19 what we provided to Dr. Hastings.

20 Next point I want to address is Mr. Fresard's
21 comments about her lack of auto industry knowledge. There is
22 no case law that has been provided by FCA that's essentially
23 stood for the proposition that a conjoint expert needs
24 industry-specific knowledge in order to effectively carry --
25 design and carry out a consumer choice survey and perform the

1 conjoint analysis. That standard doesn't exist. It's simply
2 a creation for purposes of their motion.

3 And what we do need to consider is, this is a
4 professor who has a Ph.D. in economics. She is a
5 well-regarded survey expert. She has consulted for government
6 agencies, she has testified before the Consumer Financial
7 Protection Bureau, and administered surveys in a range of
8 industries, from energy to anti-trust issues, public policy,
9 Social Security.

10 In her deposition, what she testified was that she --
11 that in order to perform a conjoint analysis and design a
12 survey, what you need to do is you need to give yourself a
13 basic knowledge of the industry that you're trying to survey.
14 And that's exactly what she's done.

15 What was ignored in both FCA's opening and their
16 reply brief is one of her sources was over 180 pages of FCA's
17 own internal documents. She reviewed that along with the
18 complaint and all the documents that were attached to it to
19 get herself up to speed. I think that provides her the basic
20 knowledge that she needs.

21 Beyond that, I -- I find it hard to speculate, to say
22 that, you know, only auto conjoint people are qualified to
23 perform auto conjoint surveys. The principles that she's
24 applying apply across industries, and be it the private sector
25 or public sector, it's basically the same exercise.

1 THE COURT: Well, the point of her participation in
2 the case at this stage is that she wants to provide an opinion
3 that she will be able to determine classwide damages; correct?

4 MR. PITOUN: That's correct, your Honor.

5 THE COURT: And in order to do that, a survey will be
6 required. She can't really do her work without that; correct?

7 MR. PITOUN: That's correct, your Honor.

8 THE COURT: Well, the point of Mr. Fresard's motion
9 is that she hasn't done anything on that yet.

10 MR. PITOUN: Well, as of October 17, 2018, when the
11 report was submitted, the survey had not yet been designed.
12 It now has been designed and it's been deployed to the field.

13 THE COURT: When was her deposition taken?

14 MR. PITOUN: If I recall correctly, that would be in
15 December 2018.

16 THE COURT: Okay. And she hadn't done -- designed
17 the survey then either?

18 MR. PITOUN: At that time it was being designed, but
19 it is now completed and in the field.

20 THE COURT: Oh. You say it's in the field?

21 MR. PITOUN: It is in the field.

22 THE COURT: People are answering questions?

23 MR. PITOUN: That's correct, your Honor. The whole
24 process takes about six months, at minimum, to do properly,
25 because you have to get -- well, as she testified in her

1 survey [sic], the first thing you do is you draft the survey
2 instrument and then you have to focus group the questions
3 to make sure that they are not misleading, they are not
4 confusing, that there is no focalism bias, and that's all been
5 completed now. And then you deploy the survey and you have to
6 get a statistically significant number of completed responses,
7 analyze that data, and then put it together to determine the
8 change in willingness to pay.

9 I just want to quickly back up to something that you
10 said earlier, I believe, in your comments or questions to
11 Mr. Edwards. What she is measuring is not the depreciation
12 at the time, at the point of purchase, it's the change in a
13 consumer's willingness to pay based on the disclosure of the
14 defect at the time of sale.

15 THE COURT: I don't recall saying anything about
16 depreciation at the time of purchase, because that doesn't
17 make any sense.

18 MR. PITOUN: You're right. I'm sorry.

19 THE COURT: Which is not to say that I don't say
20 things that don't make sense, but --

21 MR. PITOUN: It was the diminution in value at the
22 time of -- at the time of sale.

23 THE COURT: To the consumer?

24 MR. PITOUN: To the consumer.

25 THE COURT: Is that not what she is measuring?

1 MR. PITOUN: No. She is measuring the consumer's
2 change in their willingness to pay. It's slightly different.

3 THE COURT: Okay. I guess I would assume that the
4 willingness to pay is pretty much tied directly to the
5 consumer's perception of value.

6 MR. PITOUN: That's correct, your Honor. Absolutely.

7 THE COURT: Well, I got one right, huh?

8 Would you just stand by for one second? I want to
9 make a note.

10 MR. PITOUN: Sure.

11 (Pause in the proceedings at 2:51 p.m.)

12 THE COURT: I'm sorry, counsel, go ahead.

13 MR. PITOUN: So let me back up a second to the topic
14 of the lack of the completeness of her report.

15 An expert is not required to perform a complete
16 conjoint analysis at the class certification stage. That's
17 well held in the case law, and the Price case is a prime
18 example where the Court evaluated and rejected the exact same
19 argument that FCA is making here.

20 "At class certification," and I'm going to quote, "a
21 conjoint expert need not identify all features she might
22 test, how she will select the features to test, and how such
23 features will be presented in the survey." At class
24 certification --

25 THE COURT: So you're quoting -- are you still

1 quoting?

2 MR. PITOUN: That's it. Well, and I was going to --
3 yes.

4 THE COURT: What's that quote from again, please?

5 MR. PITOUN: That's from Price v. L'Oreal.

6 THE COURT: Okay.

7 MR. PITOUN: Would you like a cite? I can give you a
8 Westlaw citation.

9 THE COURT: A Westlaw cite is fine.

10 MR. PITOUN: I'm sorry?

11 THE COURT: A Westlaw cite is fine.

12 MR. PITOUN: 2018 WL 3869896 at page 11.

13 THE COURT: Thank you.

14 MR. PITOUN: And continuing, "The Court need only
15 decide if the proposal is capable of matching the liabilities
16 case to the damages case." And that's Price again, same
17 place, citing to Comcast. "The plaintiffs's burden is only
18 to show that the appropriately designed conjoint analysis can
19 reliably estimate the economic value to consumers of the
20 challenged claims." Again, Price.

21 Now, nothing in Comcast requires an expert to perform
22 his conjoint analysis at the class certification stage.
23 That's just not the requirement. And while Daubert applies
24 at class cert --

25 THE COURT: Well, the way I understand the argument

1 is that the defense would accept that proposition. The point
2 is, the expert has to be able to say that it can be done, and
3 Mr. Fresard said that she hasn't brought the goods because
4 she has been very speculative about whether a survey could be
5 designed and that -- and there is nothing upon which we can
6 rely to reach the conclusion that it can be done. But you're
7 telling me that it -- that the survey is finished and it's in
8 the field. Has that information been supplemented to the
9 defendant yet?

10 MR. PITOUN: Well, no, not directly, but again, the
11 fact that the -- because of the time span required in order
12 for us to complete a conjoint analysis and produce our merits
13 report by May 30, we would have to continue on in the process
14 in order to make that deadline.

15 THE COURT: So what are you saying, that the defense
16 should assume that you're doing what you are supposed to do?

17 MR. PITOUN: I would hope so.

18 THE COURT: All right.

19 MR. PITOUN: I mean, it wouldn't be prudent for us to
20 go full stop just simply because of how long it takes to
21 properly do this. So...

22 THE COURT: All right.

23 MR. PITOUN: And again, you know, the plaintiffs
24 admit that the Daubert standard applies at class
25 certification. But again, the standard is different in

1 the context of Rule 23, and that's where we are.

2 THE COURT: Well, the Daubert standard isn't
3 different in the context of Rule 23. Maybe the application
4 of the standard is, but the standard is the same.

5 MR. PITOUN: Well, I think you stated it better than
6 I have. The inquiry is limited to whether expert reports are
7 admissible to establish the requirements of Rule 23.

8 THE COURT: Right. In fact, I think there is -- that
9 proposition is unsettled, isn't it, whether Daubert even
10 applies at the class certification stage?

11 MR. PITOUN: Are you -- well, are you referring to
12 the Sixth Circuit -- to the Seventh Circuit case that was
13 cited by defendants?

14 THE COURT: Well, no. The Seventh Circuit case is
15 the one that district judges generally follow if they are
16 going to apply the Daubert standard, as I understand it. But
17 there is no settled Sixth Circuit law, at least appellate law,
18 that says that it is.

19 Now, there is suggestion by the Supreme Court that it
20 probably ought to be, I think, but that's -- but I didn't know
21 that you wanted to raise that point of law.

22 MR. PITOUN: I'm proceeding under the assumption that
23 Daubert applies as it relates to Rule 23.

24 THE COURT: I think that's safe and that's probably
25 what I intend to do.

1 MR. PITOUN: Okay. Now, I think the example of an
2 incomplete survey that's really too bare bones and that
3 defendants have brought to bear in their -- I believe it was
4 in their reply brief, was the report by Collin Weir in the
5 ConAgra case. And if you look at Dr. Hastings' report
6 compared to Mr. Weir's report, you're really talking about
7 two different types of reports. I mean, Mr. Weir's report
8 was eight pages. It had a basic two-page analysis of what
9 conjoint is and a bit of off-the-cuff math on how he's going
10 to apply that to the case at hand.

11 Dr. Hastings' report is much longer. And just as an
12 aside, plaintiffs attached that report to their opposition,
13 and I have a copy if the Court would like to see it. Okay.
14 Dr. Hastings' report was 29 pages. It provides extensive
15 detail on how conjoint works, the factors that she could very
16 well consider, and.

17 A. Indeed, as she has designed the survey instrument, many of
18 those possibilities have materialized into what she actually
19 has inserted into the survey.

20 And the survey population has basically been
21 determined to provide a statistically significant sample,
22 the breakdown of how many survey takers are going to be SUV
23 purchasers and potential purchasers. She is going to be
24 surveying class members and nonclass members who have purchased
25 competitive vehicles during the class period. All these things

1 have become known.

2 And she expressed -- she expressed complete
3 confidence that she had -- that she could create a conjoint
4 that would be able to measure the damages in this case. It's
5 right there in her report. And she expressed it again in her
6 deposition. I don't think there was any doubt in her voice at
7 any point during the deposition that she could do what she
8 intends to do.

9 THE COURT: All right. Anything else?

10 MR. PITOUN: At this juncture, no.

11 THE COURT: Thank you.

12 Mr. Fresard, any follow-up on this motion?

13 MR. FRESARD: Very briefly, your Honor.

14 THE COURT: There it goes again.

15 MR. FRESARD: Pretty surprised to hear that there is
16 a survey underway. The class certification schedule in this
17 case was well known to all the parties. There were extensions
18 requested and granted by the Court. There is really no excuse
19 for the plaintiffs not having at least produced the design
20 that she -- of the survey that she is now undertaking.

21 Counsel had said that they had not -- you asked
22 whether it had been provided to the defendants and he said,
23 "Not directly." We have not indirectly seen anything about
24 the survey either, your Honor.

25 THE COURT: I was trying to imagine how otherwise it

1 would be than directly.

2 MR. FRESARD: Right. And again, this just gets back
3 to the --

4 THE COURT: You know, what came to mind is whether
5 there is a duty to supplement, and there is certainly under
6 26(a)(1)(A), and probably under 26(a)(1)(B), except that's
7 a little more complicated with respect to expert reports,
8 because there is only one report, and I would imagine that you
9 won't see another one until the survey results are in. So
10 there's -- there might be nothing out there, but there is
11 some information, and I don't think it was mentioned in the
12 response to the motion either. But if you want to inquire
13 further by way of some sort of discovery before you have to
14 argue the class cert motion you can certainly do that, and I
15 would expect there would be a prompt response in light of the
16 circumstances.

17 MR. FRESARD: We will, your Honor, but I think the
18 defendant's position is that the class certification issue has
19 been fully briefed.

20 THE COURT: Yeah.

21 MR. FRESARD: And that the Court can rule on the
22 record before it, where the Court does not have a conjoint
23 analysis design proposal from Dr. Hastings to assess.

24 Briefly on the Scheckner decision again that counsel
25 talked about with Mr. Weir's conjoint analysis, that was

1 the Judge Murphy opinion in their supplemental filing, would
2 encourage the Court to read that opinion.

3 Mr. Weir submitted a conjoint analysis where he
4 actually had numbers and had terms that he was using;
5 self-cleaning oven versus, I think, partial-cleaning oven or
6 something like that. He had done a conjoint analysis and come
7 up with percentages and numbers for the Court to look at, and
8 the question, what the defendants were arguing in that, is
9 that his conjoint analysis ought to be rejected. Mr. Weir's
10 work is up here compared to Dr. Hastings' work, which at the
11 time of briefing, is down here (indicating).

12 THE COURT: You mean in terms of the evolutionary
13 stage of the project?

14 MR. FRESARD: Yes, your Honor, in terms of the Court
15 being able to assess whether it's reliable and relevant to the
16 Court's analysis on trying to assess classwide damages in this
17 case. Mr. Weir at least gave the Court some ammunition or
18 gave the Court something to look at, and Dr. Hastings just --
19 as we said, just didn't do the work in time. Now we
20 understand she is doing the work, but didn't do the work in
21 time for plaintiffs to meet their burden going forward on
22 arguing for class certification.

23 THE COURT: Okay. This motion is under advisement as
24 well. And as with the other, I'll get a written decision out
25 as soon as I can.

1 MR. PITOUN: Excuse me, your Honor. Can I just
2 address one quick correction?

3 THE COURT: You want to make a difference in your --
4 withdraw part of your argument? Is that what you want to do?

5 MR. PITOUN: No, I don't. The Weir report that
6 Mr. Fresard cites is actually in the ConAgra case.

7 THE COURT: I understood you to say that.

8 MR. PITOUN: Okay. Okay.

9 THE COURT: He mentioned that it was in Judge
10 Murphy's case, but that's not the ConAgra case.

11 Mr. Fresard, are you -- are we comparing the same
12 thing here?

13 MR. FRESARD: No. There is a Weir report in the
14 Scheckner case, your Honor.

15 THE COURT: Okay. And you're telling me that it's a
16 good idea for me to read that case before I decide this one?

17 MR. FRESARD: Yes. As far as comparing what Mr. Weir
18 did to what Dr. Hastings didn't do in this case.

19 THE COURT: Thanks. I appreciate the tip.

20 Don't sit down because you have your next motion up
21 as well.

22 MR. FRESARD: I do.

23 THE COURT: And that's the Rosenberg motion.

24 MR. FRESARD: Yes, your Honor.

25 This is defendant's motion to exclude the testimony

1 of Craig Rosenberg, who is plaintiffs' human factors expert.

2 Dr. -- excuse me -- Mr. Rosenberg --

3 THE COURT: Mister, not Doctor, yes.

4 MR. FRESARD: Yes.

5 He's a human factors expert, no doubt about it. Very
6 limited experience in the automotive realm. And I think the
7 Court had referred to the My Ford Touch. He did testify in
8 the My Ford -- or gave a deposition, I think, in the My Ford
9 Touch class action where essentially he was discussing the --

10 THE COURT: You know, Mr. Fresard, as I was reading
11 your response -- or your motion in that regard, it called to
12 mind the criticism that was leveled against Alan Mulally when
13 he came to Ford Motor Company, that he really didn't -- he
14 wasn't a car guy. And his response, I thought, was quite
15 pertinent, that he came from an industry in which there were
16 moving parts in his product at a geometric factor of about 100
17 compared to the industry that he was entering. But that's
18 just an observation.

19 MR. FRESARD: And it's a valid observation, your
20 Honor. The problem is that -- and I would say I would even
21 take that observation a little further and talk about the
22 enormous engineering challenges in the aircraft industry and
23 the amount of scientific rigor that has to be applied because
24 the stakes are so high. And we're seeing it with Boeing even
25 now. I mean, almost every product is a bet-the-company type

1 of product.

2 And I think when you look at it, Rosenberg has some
3 background in the aircraft industry and it's kind of stunning
4 that he took such an ad hoc approach in this case to his
5 testing, where he gathered some subjects in an abandoned Sears
6 parking lot, sat in the passenger seat, put a GoPro on them,
7 and took notes about whether or not they were making mistakes
8 when they shifted.

9 Then he told me at his deposition, "Well, I was
10 watching everything going on so much that my notes turned out
11 not being worth anything. We threw those aside and I relied
12 on my assistant Dr. Keller's review of the video as to whether
13 or not these people had made mistakes when they attempted to
14 shift."

15 THE COURT: Isn't that basically the same thing that
16 Chrysler's analyst did in the Lextant study?

17 MR. FRESARD: Chrysler -- the Lextant study, Lextant
18 is a vendor, so it wasn't Chrysler's analyst, but they are a
19 customer preference vendor.

20 THE COURT: Right.

21 MR. FRESARD: The Lextant group was not --

22 THE COURT: A contract analyst is what I meant to say.

23 MR. FRESARD: Contractors. They were not assessing
24 any safety features of the vehicle. They were assessing, what
25 do customers like? Do they like a joy stick? Do they like a

1 rotary knob? Do they want a traditional shifter? And they
2 are looking at a variety of features, including confusion or
3 error rates, but make -- drawing no conclusions about safety.

4 Moreover, we're not trying to -- the Lextant group
5 is not trying to get qualified to offer expert testimony in
6 any federal court; Dr. Rosenberg is. And I think a better
7 contrast might be between the work that the defendant's
8 experts did where they -- Exponent Engineering instrumented
9 vehicles with shifters using string pots and strain gauges and
10 actually had objective data as to where people were trying to
11 put the shifter at particular times, and it's scientific.

12 And that's a big problem we have with Dr. Rosenberg,
13 is that it's his opinion when he looks at somebody trying to
14 shift, whether or not -- what they were trying to do with it.
15 And not even his, it's his assistant's opinion as she explains
16 it to him.

17 THE COURT: Is this a weight or an admissibility
18 issue? I know what you're going to say the answer is, but why
19 isn't it a weight issue?

20 MR. FRESARD: Because it is so unreliable. It is so
21 unscientific that it doesn't meet -- it's never been -- you
22 know, he hasn't published anywhere. There's no studies
23 published saying that this is a way to scientifically assess
24 error rates in shifters, and it is so subjective it doesn't
25 meet even the basic Daubert requirements of empirical testing.

1 And I think the way to really test that is, can we go out and
2 replicate what Mr. Rosenberg did?

3 THE COURT: All you need is an abandoned Sears
4 parking lot and a GoPro; right? So of course you can.

5 MR. FRESARD: There are probably a few Sears parking
6 lots that we could find.

7 But no, the problem is that, whose opinion are we
8 going to listen to as far as whether or not the operator was
9 intending to shift into a particular gear? Do we just use
10 his --

11 THE COURT: Is the video footage available?

12 MR. FRESARD: It is, if -- but what standard would we
13 apply is the question. It's got to be empirical, scientific
14 work. So we've got to be able to look at the video and come
15 to the same conclusions as Dr. Rosenberg by looking at it.

16 The plaintiffs said in their briefing that we can
17 fact check Dr. Rosenberg, but that's not our job. It's their
18 job. They have the burden of proof of coming forward with
19 reliable scientific evidence for the Court to use in assessing
20 whether to certify a class in this matter.

21 And the problem is, we could watch that video and
22 disagree with Dr. Rosenberg and say, no, we think there were
23 only nine errors, or we could say, wow, we think there were
24 22 errors. But I think if you had five different people watch
25 the video, you would probably have five different conclusions

1 as to what types of errors were made and whether or not the
2 person was intending to shift into a particular gear. And
3 that's the big problem with his study; it's just, we don't
4 have instruments on the shifters. We don't have data.

5 Another problem we have with his study from a
6 scientific standpoint, and really from an admissibility
7 standpoint, your Honor, is that Dr. Rosenberg compared the
8 monostable shifter in a 2015 Grand Cherokee, which is a class
9 vehicle, to a polystable shifter, which is a new electronic
10 shifter in a 2019 Cherokee. The vehicles are different.

11 THE COURT: Well, sure, the vehicles are different.
12 The shifter is the same, though, as what was used in the
13 Lextant study, isn't it?

14 MR. FRESARD: The polystable shifter is the shifter
15 that was assessed in the 2012 Lextant study, yes, your Honor.

16 THE COURT: Right. Okay.

17 MR. FRESARD: But that shifter was commercially
18 unavailable. It wasn't even invented at the time that the
19 class vehicles were designed and released with the monostable
20 shifter. That polystable shifter was developed internally at
21 FCA. It was invented, it was the first of its kind, and
22 ultimately was rolled out in vehicles after the class vehicles.

23 But he is comparing the monostable shifter against
24 technology that was commercially unavailable to FCA at the
25 time they designed this shifter. And so we think it's

1 irrelevant. It doesn't fit the facts of this case.

2 So essentially, your Honor, we -- it's the defendant's
3 position that Mr. Rosenberg just doesn't have enough experience
4 in the automotive field to give us opinions about appropriate
5 shifter design from a human factors perspective. But our
6 primary criticism is the really subjective nature of his
7 testing and having an assistant watch video and then using
8 that, and so we think it's inadmissible at this stage.

9 THE COURT: All right, Mr. Fresard. I understand
10 your argument. Thank you.

11 MR. FRESARD: Thank you.

12 THE COURT: And Mr. Pitoun, are you taking this one
13 as well?

14 MR. PITOUN: I am, your Honor.

15 THE COURT: You may proceed.

16 How did Mr. Rosenberg determine that there was a
17 shifting error?

18 MR. PITOUN: So first what he did was he reviewed the
19 Lextant study and he looked at the eight types of errors that
20 were categorized in that study. And then what he did was he
21 basically selected five of them, the five that were easiest to
22 identify visually on the GoPro, and those were the five that
23 he tested for.

24 THE COURT: Well, how did he detect that an error had
25 occurred?

1 MR. PITOUN: So they -- so the types of errors --
2 for example, there was an undershoot error where, say, for
3 example, you're trying to go from drive to park, and the task
4 assigned to you says you go from drive to park and the driver
5 only attains reverse. The GoPro camera could capture that.

6 There is an overshoot error which the driver is
7 supposed to go from, say, drive to reverse, but the driver
8 goes all the way to park.

9 THE COURT: So in order to make that determination
10 that there was an error --

11 MR. PITOUN: Right.

12 THE COURT: -- the tester would have to know, A, what
13 the driver's intention was to begin with, and B, that there is
14 some evidence that the driver did not achieve that result; is
15 that correct?

16 MR. PITOUN: That's correct, your Honor.

17 THE COURT: So how do you figure out the first?

18 MR. PITOUN: The first part -- well, the task is
19 given by the test administrator, either Dr. Rosenberg or
20 Dr. Miller, at the time or immediately before the test subject
21 is supposed to do the test.

22 THE COURT: So they're saying, "You have to drive
23 over here and put it in park"?

24 MR. PITOUN: Sure. Or, you know, some of the -- so
25 let's use an example.

1 Some of the tests were done in a stationary setting.
2 So the vehicle was stationary with the foot -- the driver's
3 foot on the brake. And then the -- you know, Dr. Rosenberg
4 might say, "Okay, the vehicle is in drive" -- or say, "The
5 vehicle is in drive. Please put the vehicle into park," and
6 they would only achieve reverse. That would be recorded as
7 an error.

8 THE COURT: Okay. All right.

9 MR. PITOUN: Okay. And then I apologize. I forgot
10 the second part of what you mentioned.

11 THE COURT: Well, I -- you had to know what the
12 driver's intent was and then you had to know the driver failed
13 at achieving that result.

14 MR. PITOUN: That's correct.

15 THE COURT: And I think you addressed them both.

16 MR. PITOUN: Okay. And as a caveat to that point,
17 you know, Mr. Fresard brings up the point that Dr. Rosenberg
18 initially had handwritten notes which he ultimately ended up
19 not using because he didn't find them to be reliable. The
20 GoPro camera turned out to be far more reliable. I mean, it
21 records at 60 frames a second. And the alternative is to rely
22 on unreliable notes, which seems like it would be kind of a
23 foolhardy thing to do.

24 THE COURT: Was there audio with the GoPro?

25 MR. PITOUN: To my -- I don't know offhand.

1 THE COURT: The reason I ask is, how would one know
2 what the instruction to the driver was if there was not audio?
3 Or was there some other contemporaneous record made?

4 MR. PITOUN: So there were -- there was, like --
5 Dr. Rosenberg had, like, a check box or, like, a -- I'm
6 sorry -- like, a syllabus that he would go through with the
7 driver. "Okay. Now we're going to do a three-point turn."

8 THE COURT: Are those notes available?

9 MR. PITOUN: Yes.

10 THE COURT: Are those records available?

11 MR. PITOUN: Yes.

12 THE COURT: All right.

13 MR. PITOUN: And with regards to the video, those
14 have been produced to defendants. As I recall, the test
15 instructions have also been produced.

16 We're sort of at a loss as to why defendants haven't
17 gone through the videos and basically sought to dispute the
18 point or sought to dispute Dr. Rosenberg's conclusions.
19 Dr. Rosenberg literally invited them to do that during his
20 deposition.

21 THE COURT: When was that deposition taken?

22 MR. PITOUN: Also in December.

23 THE COURT: December. All right.

24 MR. PITOUN: Well, what's essential to keep in mind
25 is that Dr. Rosenberg essentially replicated the methods that

1 were used in the 2012 Lextant study. That Lextant study
2 was commissioned by FCA itself, nearly identical shifting
3 tasks and identical shifting sequences, and Dr. Rosenberg
4 identified an error rate that was basically the same as what
5 Lextant did.

6 Dr. Rosenberg concluded an error rate of
7 eleven-to-one versus from the monostable to the polystable.
8 Lextant observed an error rate of ten-to-one from the
9 monostable to the polystable.

10 THE COURT: So why do you need him?

11 MR. PITOUN: I'm sorry?

12 THE COURT: Why do you need him?

13 MR. PITOUN: Well, we -- it's sort of a symbiotic
14 relationship, if you will, your Honor. His results continue
15 to show that in a post-recall vehicle, which is what we used
16 for the 2015 Jeep Grand Cherokee, there is still a risk of
17 error that makes this vehicle dangerous on a continuing basis.

18 FCA's asserted that the recall takes care of the
19 problem and we assert that it doesn't.

20 THE COURT: All right.

21 MR. PITOUN: One other thing about the way that FCA
22 sought to characterize the Lextant study, it's saying that
23 this is a marketing study, that it was commissioned to examine
24 potential future products. But at the same time, you still
25 need to have your study carried out in a manner that's

1 scientifically rigorous, that essentially gives results to the
2 commissioning party; in this case, FCA, that they can actually
3 rely on.

4 And so even if it's a marketing study or however they
5 want to characterize it, if it weren't scientifically robust,
6 then I don't think they would ever, you know, commission a
7 Lextant study ever again. I mean -- or they would have
8 stopped the study midway through and said, "You guys are not
9 going to give us data we can actually use," but it doesn't
10 seem like they have done that.

11 The criticism that, you know, Dr. Rosenberg is using
12 a GoPro camera, their expert, Dr. Cades-Young -- or I'm sorry,
13 I've linked two people together. Dr. Cades and Dr. Young,
14 they used a GoPro camera.

15 And as it relates to Dr. Rosenberg's lack of industry
16 experience, as you point out, you know, his background in the
17 aerospace sector arguably gives him a more safety-critical
18 background in the realm of human factors. But as mentioned
19 in our brief, and FCA never really seems to respond to this
20 point, he was working with Dr. Erica Miller, who is a
21 specialist in human factors as it relates to the automotive
22 sector. She is the one who did the coding, and whenever there
23 were close calls, she brought her questions to Dr. Rosenberg
24 and they conferred.

25 The other --

1 THE COURT: I don't -- go ahead. I was going to tell
2 you I don't have any additional questions.

3 Do you have any additional argument?

4 MR. PITOUN: I just want to comment really quickly on
5 the whole point, on their argument on instrumentation.

6 FCA has made a big point about this, that he didn't
7 instrument the cars, et cetera. But if you actually read the
8 Cades-Young report very carefully, even though they talk about
9 how much they instrumented the cars, the results of that
10 instrumentation, it hardly shows up in their conclusion. It
11 doesn't -- it's essentially a measurement with no purpose.
12 That's what we would assert now.

13 THE COURT: All right. Thank you.

14 Mr. Fresard, any follow-up?

15 MR. FRESARD: I won't say the magic words, but I will
16 be brief.

17 I guess as I was listening to counsel's argument,
18 your Honor, I was just thinking about we're arguing here today
19 on the admissibility of the expert testimony on the class
20 certification issues, and what came to mind is the materiality
21 prong of the Court's analysis. And if we're to understand the
22 plaintiffs, the alleged defect in the shifter is that it leads
23 to a higher rate of error. I think what I just heard in the
24 argument is that it causes a higher rate of error. And what's
25 the risk of that error is that you may not achieve park, and

1 if the driver gets out of the car the vehicle could have a
2 rollaway.

3 But there has been a recall that instituted an
4 autopark feature that eliminates that risk. And the question
5 in my mind is, what is the material omission? What is the
6 material safety risk that still exists post-recall that
7 Mr. Rosenberg is helping the Court assess? I'm struggling
8 to find it.

9 That's all I have.

10 THE COURT: Is that a confession?

11 MR. FRESARD: It is.

12 THE COURT: All right. Well, despite your struggles,
13 Mr. Fresard, I'm still going to take this under advisement,
14 and I will get you a written decision on that in due course
15 as well.

16 Is there anything further for the record today on
17 these motions?

18 MR. MILLER: No, your Honor, not for plaintiffs.

19 MR. FRESARD: Not from the defense, your Honor.

20 THE COURT: All right. Thank you for your
21 presentations. I thought these were well briefed and have
22 presented very interesting issues, something beyond the
23 garden-variety case, although we don't really get a lot of
24 garden-variety cases here in federal court.

25 We do have a status conference scheduled today. I

1 think you had sent me an agenda, but I don't have it with me,
2 so I have no clue what's on it right now.

3 MR. WILLIAMS: Your Honor, we did send an agenda. It
4 had a single agenda item on it.

5 THE COURT: And it's you; right?

6 MR. WILLIAMS: That's me.

7 THE COURT: All right. Go ahead, Mr. Williams.

8 MR. WILLIAMS: Your Honor, we're asking for a 60-day
9 extension. We're seeking a 60-day extension of the scheduling
10 order that's entered on the personal injury side of the case.
11 I would note that it's not --

12 THE COURT: An extension of everything?

13 MR. WILLIAMS: Of the remaining dates, yes, your
14 Honor. This is our unopposed request for an extension.
15 Plaintiffs have agreed to 60 days.

16 There is good cause for this for a few reasons, your
17 Honor.

18 THE COURT: Step back one second. What is left? How
19 many of these cases are left?

20 MR. WILLIAMS: There's seven, your Honor.

21 THE COURT: Okay.

22 MR. WILLIAMS: There's good cause for the extension
23 for a few different reasons. One, the trial team does, in
24 fact, have some competing trial obligations in related
25 monostable cases. There is a monostable case that's in

1 California that is set to go in the midst of our scheduling
2 order.

3 THE COURT: In a state court?

4 MR. WILLIAMS: In a state court, yes, your Honor. I
5 understand. But of course, your Honor, as the federal court
6 gives comity and respect for the actions of state courts as
7 well, and I hope we can consider that accordingly.

8 In addition, I would say that there are, frankly,
9 your Honor, slightly more cases than we anticipated being in
10 this track. I recognize that seven is not an overwhelming
11 number.

12 THE COURT: Well, no, but you thought you would have
13 more settled by now?

14 MR. WILLIAMS: We have been hopeful, your Honor, yes.
15 So I think that's --

16 THE COURT: Are any of those still hanging fire with
17 Judge Rosen?

18 MR. WILLIAMS: No, your Honor. There are two cases
19 that actually had never gone before Judge Rosen, and that's
20 the Aryeh case, which is the Zimbabwe case.

21 THE COURT: I thought that was resolved.

22 MR. WILLIAMS: Well, and that's what I was about to
23 say. We're still working on resolving that one. And the
24 Scarso case, which is a late-filed case that -- a straggler
25 case also has not been in front of Judge Rosen because it was

1 late. So we're also working to resolve that one as well.

2 THE COURT: So is the Zimbabwe case also included in
3 the seven count?

4 MR. WILLIAMS: Yes, your Honor.

5 THE COURT: All right. What do you have left to do?

6 MR. WILLIAMS: So we do -- essentially, discovery.
7 The parties have filed -- they filed a master complaint. We
8 filed our answer. We have exchanged initial disclosures. But
9 discovery is now opening, so we have to do everything from
10 start to finish, nuts to bolts, depositions. There has been
11 no exchange by any party of any form of written discovery
12 because all efforts have been focused on settlement. So...

13 THE COURT: Are any of those direct files?

14 MR. WILLIAMS: The Aryeh case, your Honor, yes. I
15 don't believe any of the remaining ones are.

16 THE COURT: So those would all be going back to their
17 home districts anyway, right, when pretrial proceedings --

18 MR. WILLIAMS: That's correct, your Honor.

19 THE COURT: -- are finished?

20 MR. WILLIAMS: That's absolutely right.

21 THE COURT: Unless there is a --

22 MR. WILLIAMS: Resolution.

23 THE COURT: Or a stipulation.

24 MR. WILLIAMS: Correct. If we saw a Lexecon
25 waiver -- I haven't seen one yet, but we would do it here, I

1 suppose. I would say FCA hasn't made that decision yet, but I
2 wouldn't -- I guess we will wait and see.

3 But, your Honor, I would also note that even with the
4 60-day extension we would still be completing everything,
5 including all dispositive motions and motions challenging
6 experts within the calendar year. So that at least provides
7 some small reassurance to the Court that we are at least
8 trying to press.

9 THE COURT: Thank you.

10 MR. WILLIAMS: Thank you.

11 THE COURT: Mr. Miller, do you have a comment on this
12 request?

13 MR. MILLER: Your Honor, I believe 60 days is
14 reasonable and I think it comes within the professional
15 courtesy contemplated by the civility principles, so we do
16 not oppose the request.

17 THE COURT: That's such a low blow, citing those
18 civility principles. It just -- even though they interfere
19 with my case management prerogative?

20 Mr. Williams, I think we can accommodate that.

21 MR. WILLIAMS: I appreciate that, your Honor. Thank
22 you.

23 THE COURT: I'll get an order entered on it.

24 MR. WILLIAMS: Thank you.

25 THE COURT: Anything else?

1 MR. MILLER: No, your Honor.

2 MR. FRESARD: Nothing from the defense, your Honor.

3 THE COURT: What's the status of your discussions
4 with Judge Rosen on the economic loss cases? I thought you
5 had an initial meeting with him on that.

6 MR. MILLER: Your Honor, we have had two formal
7 mediation sessions. We have another one scheduled, I believe,
8 the day after the class certification hearing, so we're
9 actively engaged in that process.

10 THE COURT: All right. Just curious. All right.
11 Thank you.

12 MR. MILLER: Thank you, your Honor.

13 THE COURT: Have a good afternoon. Court is in
14 recess.

15 THE CLERK: All rise. Court is now in recess.

16 (Proceedings adjourned at 3:26 p.m.)

17 * * *

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19 CERTIFICATE OF COURT REPORTER

20

21 I certify that the foregoing is a correct transcript
22 from the record of proceedings in the above-entitled matter.

23

24 s/ Rene L. Twedt
RENE L. TWEDT, CSR-2907, RDR, CRR, CRC
25 Federal Official Court Reporter

May 2, 2019
Date